No. 92-9093

In The

Supreme Court of the United States

October Term, 1993

JOHN JOSEPH ROMANO,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The
Court Of Criminal Appeals Of Oklahoma

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

The following potentially misleading statements of law and fact in the briefs of respondent and its *amici* require reply.

> 1. *"Oklahoma is not alone in its determination that this type of error may be harmless. Despite the defendant's contentions to the contrary, many States that have considered the issue refuse to apply a per se reversible error rule to this type of evidence."* **Brief of Respondent at 48.** *"As the authority below will show, other States have applied harmless error analysis to this evidence, have ruled the evidence not to be error at all, and have even found that the defendant had legitimate reasons to seek introductions of the evidence."* **Brief of Respondent at 17.**

These assertions apparently are based on a misreading of the question presented in this case, as most of the cited cases do not concern admission of evidence that the defendant has already been sentenced to death in an unrelated case. A number of the lower court cases cited by the State concern the resentencing of a capital defendant after his death sentence had been vacated rather than a death sentence in another case.[1] Many of the cases

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[1] *Willie v. Maggio*, 737 F.2d 1372 (4th Cir. 1984), *cert. denied*, 469 U.S. 1002 (1984); *Sireci v. State*, 587 So.2d 450 (Fla. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1500 (1992); *State v. Atkins*, 399 S.E.2d 760 (S.C. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2913 (1991); *People v. Whitt*, 798 P.2d 849, 859 (Cal. 1990); *People v. Anderson*, 801 P.2d 1107 (Cal. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 148 (1991); *People v. Brisbon*, 544 N.E.2d 297 (Ill. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1796 (1990); *Turner v. Commonwealth*, 364 S.E.2d 483 (Va.), *cert. denied*, 486 U.S. 1017 (1988).

are further inapposite because they do not involve admission of evidence.[2]

More importantly, the majority of the cases relied upon by the State of Oklahoma involved a death sentence that had been vacated.[3] Significantly, in each of those cases, the sentencers knew that the defendant would not be put to death unless they themselves determined that he should be, that is, that their decision was a necessary step along the road to execution.

Only four cases cited by the State involve admission of evidence of a prior death sentence for another case.

[2] *Willie v. Maggio*, 737 F.2d 1372 (one or more jurors had learned about the previous death sentence outside of the courtroom prior to being called to jury duty and were examined on voir dire to ensure that they would not be influenced by that prior decision); *State v. Atkins*, 399 S.E.2d 760 (same); *State v. Bell*, 393 S.E.2d 364 (S.C.), *cert. denied*, 498 U.S. 881 (1990) (same); *People v. Whitt*, 798 P.2d 849 (the judge explained to the jury that they were to resentence the defendant whose prior death sentence had been vacated on appeal); *People v. Anderson*, 801 P.2d 1107 (same); *Turner v. Commonwealth*, 364 S.E.2d 483 (same); *Sireci v. State*, 587 So.2d at 452-53 (the prosecutor briefly referred to the defendant's having been on death row; the appellate court noted that "a prior sentence should not play a role in resentencing proceedings" but found that the prosecutor's reference was minimal and agreed with defendant that the jury could not help but perceive that he had been on death row).

[3] *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2277 (1991); *Willie*, 737 F.2d 1372; *State v. Bradley*, 538 N.E.2d 373, 393 (Ohio 1989), *cert. denied*, 497 U.S. 1011 (1990); *Anderson*, 801 P.2d 1107; *Brisbon*, 544 N.E.2d 297; *Whitt*, 798 P.2d 849; *Sireci*, 587 So.2d 450; *Atkins*, 399 S.E.2d 760; *Turner*, 364 S.E.2d 483.

None include persuasive reasoning for affirming the sentence in the case before this Court. In fact, three of the four contain language that lends support to Petitioner's position that a prior death sentence is irrelevant and prejudicial. The fourth involved a case where the jury had no discretion under the circumstances of the case.

In *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), evidence was admitted regarding a prior, unrelated death sentence that had been vacated when the South Carolina Supreme Court declared the state's death penalty statute unconstitutional. The question presented was whether that evidence, coupled with the trial court's use of the word "recommend" in referring to the jury's role, led the jury to believe its role was advisory only. The Court of Appeals for the Fourth Circuit concluded that the evidence concerning the prior vacated death sentence did not improperly describe the jury's role under local law, but agreed with the defendant "that evidence of a prior-vacated death penalty is of limited, if any, relevance to the jury's decision whether to impose the death penalty." *Id.* at 954. Because the jury was not informed that Gaskins was presently under a sentence of death, there was no risk that the jury's sense of responsibility would be diminished in the way that exists in the case at bar. That is, there was no risk that the jury would feel their task in this case was futile, that the defendant would be executed regardless of their decision.

State v. Bradley, 538 N.E.2d 373 (Ohio 1989), *cert. denied*, 497 U.S. 1011 (1990), also involved a prior vacated death sentence, which was referenced in a two hundred eighty-five page police report admitted into evidence. *Id.* at 393 (Brown, J., dissenting). The question on appeal was

whether defense counsel's failure to object to admission of the report constituted ineffective assistance of counsel. The Ohio Supreme Court appreciated that the reference to the prior death sentence was "arguably damaging," but did not believe failure to object to it rose to the necessary level of prejudice to establish ineffectiveness. *Id.* at 382. Because the error was analyzed as an ineffective assistance of counsel claim rather than as a *Caldwell*[4] error, the court placed on the defendant the burden of proving a reasonable probability that the result of the trial would have been different had the police report been excluded. The court found that the defendant did not meet this burden.

In *State v. Williams*, 657 S.W.2d 405 (Tenn. 1983), *cert. denied*, 465 U.S. 1073 (1984), the defendant stipulated to two past murder convictions and the sentences imposed, one of which was the death penalty. When the prosecutor referred to the prior death sentence in making his closing argument, no objection was made. The defendant complained on appeal that the jury might have given him life had it not known of his past sentence of death. Because the defendant stipulated to the evidence and made no objection to the prosecutor's comment, and because the aggravating circumstances were strong and no mitigating evidence was presented, reversal was not required. Perhaps out of concern that its opinion could be misconstrued or broadly applied, the Tennessee Supreme Court specifically emphasized that such evidence should not be admitted except by agreement of the parties. *Id.* at 414-15.

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[4] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Commonwealth v. Beasley, 479 A.2d 460 (Pa. 1984), a pre-*Caldwell* case, is the only case cited by the State other than *Williams* that both concerned admission of evidence of an unrelated death sentence and raised the question of whether the jury's sense of responsibility was diminished by this evidence.[5] The Pennsylvania Supreme Court relegated the issue to a one-sentence, conclusory footnote which read, "There is no support in the record for appellant's claim that the jury regarded his life as not truly being in its hands, due to awareness of this preexisting death verdict, and, hence, appellant's contention that the death question was not given serious consideration is unfounded speculation." 479 A.2d at 465 n.5.

Had that court had the benefit of this Court's decision in *Caldwell*, and squarely addressed the issue, however, the result would have been the same. *Beasley* exemplifies a situation where a court could reasonably conclude that admission of the evidence had no effect on the jury's verdict. Under Pennsylvania law, when an aggravating circumstance is present and no mitigating circumstances are found, the jury is required to return a verdict of death.[6] *Id.* at 464. In *Beasley*, the jury found one aggravating factor and no mitigating circumstances. *Id.* Thus, a death verdict was mandatory; the jury had no

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[5] Ironically, the State did not cite *Beasley* for this proposition, but rather, for the proposition that a sentence of death is relevant for the jury to consider. The Pennsylvania Supreme Court reached this conclusion solely as a matter of state law interpretation of the term "conviction" as used in the statute governing introduction of aggravating evidence.

[6] This Court affirmed that aspect of Pennsylvania's death scheme in *Blystone v. Pennsylvania*, 494 U.S. 294 (1990).

discretion. The fact that the defendant had already been sentenced to die could have had no effect on the jury's verdict.

Of the four cases cited by the State that concern admission of evidence of a death sentence in another case, in two of the cases, *Gaskins* and *Bradley*, the jury knew that sentence of death had been vacated; in *Beasley* the jury had no discretion under the facts of the case and the law of the state; and in *Williams* the defendant stipulated to the evidence. Not one of these cases can be read as an endorsement of admitting evidence that a capital defendant has already been sentenced to death for another murder.

2. *"The Judgment and Sentence, though later reversed, was still relevant evidence to prove the 'continuing threat' aggravating circumstance."* Brief of Respondent at 39. *"[T]he prior [vacated] conviction for murder is still relevant to an aggravating factor. . . . "* Amici Curiae Brief at 11 n.1.

The evidence of the prior murder conviction, including the later-vacated Judgment and Sentence at issue in this appeal, was introduced to support two aggravating circumstances: that the defendant had been previously convicted of a felony involving the use or threat of violence **and** that the defendant posed a continuing threat to society. The Oklahoma Court of Criminal Appeals determined that reversal of the Thompson conviction rendered it unavailable to support the prior violent felony aggravator, but the opinion is unclear as to whether the conviction could be used to support the continuing threat

aggravator. *Romano v. State*, 847 P.2d 368, 389 (Okla. Crim. App. 1993).

This Court's opinion in *Johnson v. Mississippi*, 486 U.S. 578 (1988), however, was not unclear. The Court held that allowing a death sentence to stand that was based in part on a vacated conviction violates the Eighth Amendment. The Court unequivocally stated that reversal of a conviction deprives the documentary evidence of that conviction of any relevance.

The State argues that the evidence of the vacated judgment and sentence for the Thompson homicide was not "materially inaccurate" as was the case in *Johnson v. Mississippi* because the document in this case was used to support two aggravators instead of one. This argument defies logic. If use of an invalid non-death penalty conviction to support one aggravator violates the Eighth Amendment, it follows, *a fortiori*, that using a vacated death penalty conviction to support two aggravating factors is at least twice as egregious.

3. *"[A]ny infirmity with the Judgment and Sentence caused by its later reversal was harmless error as applied to the 'continuing threat' aggravating circumstance"* because *"[i]n addition to the Judgment and Sentence in the Thompson case, the State also presented witnesses during the sentencing stage who testified as to the defendant's involvement in the Thompson murder."* Brief of Respondent at 39-40.

"Far more convincing to the jury than the bare Judgment and Sentence which was introduced here were the facts of the Thompson murder which were testified to by different witnesses. The underlying facts of the Thompson murder were important to

establish the continuing threat aggravating circumstance. It is illogical to assume that the jury placed more weight on the court document than they did the live testimony of the witnesses." Brief of Respondent at 57, footnote omitted.

"[E]vidence of the prior murder itself would properly tend to lead the jury to the conclusion that a capital sentence was appropriate in this case. What Petitioner posits is that this jury's awareness of the additional extraneous fact that Petitioner was under another capital sentence would make the difference in this jury's determination between a sentence of life and death on the facts of this case. . . . It is far more likely that the jury would conclude instead that the death penalty was appropriate in this case because the defendant had committed a previous murder. . . . " Amici Curiae Brief at 11.

Despite the State's and Amici's heavy reliance on evidence of the Thompson homicide as rendering harmless the admission of the evidence of the death sentence for the Thompson homicide, neither elaborates on what witnesses were presented or the testimony they gave, nor gives citation to the record where that evidence was presented. As discussed below and as the record shows, no evidence suggested that the defendant was involved in the Thompson murder.[7]

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[7] The Respondent's Brief also misstates evidence of this trial by confusing the defendant with his co-defendant David Woodruff. The Statement of Facts recites that on October 12, 1985, the defendant and Woodruff went to an electronics store where the defendant knew the manager, and that the manager noticed a stain on the defendant's pants that looked like blood. Upon inquiry, the manager was told that he had cut his hand while painting a house. Respondent's Brief at 5-6. Actually it

The opinion below correctly states that the evidence comprised testimony by "Thompson's neighbor concerning her observation the day of the homicide, the autopsy report reflecting the pathological diagnoses of the victim and photographs and fingerprints showing that the defendant in that case was in fact the Appellant."[8] 847 P.2d at 389. The assertion that this evidence proved that Mr. Romano killed Lloyd Thompson and that he constituted a continuing threat to society is misleading.[9] Ironically, a more detailed review of the evidence reveals how it failed to implicate Mr. Romano in the Thompson homicide.

Olie Irvin, the neighbor who testified, neither identified anyone nor described the person or persons she saw changing Thompson's tire on the day of the homicide, even as to the most general details such as the number,

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was Woodruff who knew the Manager, and it was Woodruff who allegedly had a cut on his hand and a stain on his pants. (Tr. IV 20, 22-23).

[8] Absent from the court's summary of evidence is reference to testimony given by Greg Myers. Apparently the Oklahoma court disregarded Mr. Myers' testimony in its evaluation of the evidence supporting "continuing threat" because Mr. Myers recanted his testimony. *See* Petitioner's Brief at 6 n.4.

[9] The Opinion rendered in this case by the Oklahoma Court of Criminal Appeals likewise implies that there was more evidence concerning the Thompson murder than actually exists in the record. The court found that "the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence." 847 P.2d at 389, and that those facts were sufficient to support the continuing threat circumstance. 847 P.2d at 394.

gender, or race. At most her testimony suggested circumstantially that the unknown person who helped change the tire was in the apartment when Thompson was killed. (Tr. VI 25-28).

The remaining evidence introduced likewise did not remotely connect the Petitioner with the Thompson homicide. The autopsy report reflected the pathological diagnosis of the victim and did not implicate the Petitioner in any way. (Tr. VI 45). The final evidence to which the Oklahoma Court referred was "photographs and fingerprints showing that the defendant in that case was in fact the Appellant." 847 P.2d at 389. This reference was not to fingerprints found at the Thompson homicide scene or to photographs linking the Petitioner to the crime, but rather to the stipulation by the parties that J.T. Rupe, who keeps records for the Oklahoma County Sheriff, would testify that the prior felony convictions involved the same defendants that were on trial. (Tr. VI 47). The only significance of this stipulation, after the conviction for first-degree murder was vacated, was to establish the non-violent prior felony convictions used to enhance the robbery conviction in this case. Thus, the stipulation provided no support for the death penalty.

Without the documentary evidence of the murder conviction, which cannot lawfully be considered in light of the reversal, no evidence whatsoever connected Mr. Romano to the Thompson murder. The State's and Amici Curiae's arguments that proof of the Thompson homicide, and not the death sentence, actually compelled the Sarfaty jury to sentence the Petitioner to death are specious.

> 4. *"[T]he Oklahoma Court applied a harmless error analysis and determined that the prior death sentence evidence could not have affected the jury's sentencing verdict in this case."* Respondent's Brief at 12 (emphasis added). See also Respondent's Brief at 29.

Actually, the Oklahoma Court did neither. Rather than determining that the prior death sentence evidence could not have affected the jury's sentencing verdict, the court recognized its potentially damaging effect: "Learning that the defendant had previously received a death sentence for another murder **could** diminish the jury's sense of importance of its role and mitigate the consequences of their decision." 847 P.2d at 390 (emphasis added). Rather than applying the harmless error test, the court presumed the jury's decision to be correct, *id.* at 391, and found it "highly unlikely" that the jury's sense of responsibility would have been diminished.[10] *Id.* at

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[10] The court's opinion that it was highly unlikely that the jury's sense of responsibility was not diminished was based in part on a misstatement of instructions. The Oklahoma Court found that the trial court's instructions prevented the evidence of the prior death sentence from causing the jury to consider their decision any less significant. In describing the instructions that allegedly had this preventative effect, the court stated that the jury was instructed "that they should not surrender their own judgment to that of any witness **or item of evidence**. . . ." 847 P.2d at 390 (emphasis added). Neither the Court of Criminal Appeals' Opinion nor the Respondent's Brief cites the location in the record of an instruction informing the jury they should not surrender their judgment to any item of evidence, nor can counsel find any such instruction.

390. The test for harmless error does not include according a presumption of correctness to the verdict. *Cf. Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) ("[t]he question . . . is not whether the legally admitted evidence was sufficient to support the death sentence"). Moreover, the "highly unlikely" test differs significantly from the "harmless error" test both in the quantity of proof required and in the allocation of that burden of proof. The harmless error standard requires the State to prove beyond a reasonable doubt that the evidence complained of did not influence the jury's decision. *Id.* The "highly unlikely" standard allocates the burden of proof to the defendant and allows affirmance even though a possibility remains that the jury's sense of responsibility was diminished.

CONCLUSION

The judgment of the Oklahoma Court of Criminal Appeals affirming Petitioner's sentence of death should be reversed.

Respectfully submitted,

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